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19-P-1245

Appeals Court

ITHACA FINANCE, LLC vs. FRANCISCA LEGER.

No. 19-P-1245.

Suffolk. January 7, 2021. - March 30, 2021.

Present: Lemire, Ditkoff, & Grant, JJ.

Real Property, Tax title, Foreclosure of tax title. Taxation, Real estate tax: tax taking, Real estate tax: foreclosure of tax lien, Real estate tax: foreclosure of right of redemption. Practice, Civil, Relief from judgment. Judgment, Relief from judgment. Due Process of Law, Notice, Taking of property. Notice, Tax taking, Foreclosure of mortgage. Mail.

Complaint filed in the Land Court Department on May 20, 2014.

A motion for relief from judgment was heard by Howard P. Speicher, J.

Kevin P. Geaney for the plaintiff.
Brian T. Corrigan for the defendant.

LEMIRE, J. When judgment foreclosing a taxpayer's right of redemption enters in the Land Court, "the taxpayer loses any equity he or she has accrued in the property, no matter how

small the amount of taxes due or how large the amount of equity." Tallage Lincoln, LLC v. Williams, 485 Mass. 449, 453 (2020) (Williams). After a judgment of foreclosure has entered in a tax taking case, a taxpayer may move to vacate the judgment if he or she has redeemed the property within one year. G. L. c. 60, § 69A. Beyond this one-year period, however, the judgment may be vacated only when a "party alleges a violation of its rights to substantive or procedural due process." Worcester v. AME Realty Corp., 77 Mass. App. Ct. 64, 67 (2010).

The plaintiff, Ithaca Finance, LLC (Ithaca), appeals from an order of the Land Court allowing the motion of the defendant,¹ Francisca Leger, for relief from a judgment foreclosing her right of redemption. Leger's motion was filed more than one year after judgment had entered. The judge determined that Ithaca violated Leger's due process rights by failing to comply with various communication and notification requirements contained in G. L. c. 60, § 2C. We conclude that the special citation mailed to Leger by the Land Court, which notified her of Ithaca's petition to foreclose, satisfied her right to due process. Because, after one year has passed, only a violation

¹ Ithaca named a number of parties as defendants. Leger is the only defendant participating in this appeal and, therefore, is the only defendant to which we refer.

of Leger's right to due process may justify vacating the foreclosure of the right of redemption, we reverse.

Statutory background. A brief overview of the tax taking process provides context for the present appeal. See generally Williams, 485 Mass. at 451-453.

A taxpayer who fails to pay their real estate taxes enables a municipality or its assignee (as occurred here) to conduct a tax taking. See G. L. c. 60, §§ 2C, 53. Once the assigned party provides the requisite notice of taking, it obtains tax title, i.e., legal ownership, to the property subject to the taxpayer's right of redemption, at the time and place designated in the notice. See G. L. c. 60, § 53. After the taking, the assigned party records an instrument of taking in the registry of deeds, which notifies prospective purchasers that the property is being taken. See G. L. c. 60, § 54; Franklin v. Metcalfe, 307 Mass. 386, 389-390 (1940). The taxpayer then has six months to "redeem" the property by paying the balance of overdue taxes, fees, costs, and interest.² See G. L. c. 60, §§ 61, 65. If the taxpayer does not redeem the property, the assigned party "may bring a petition in the [L]and [C]ourt for

² Interest accrues at fourteen percent annually from the time taxes are due until the time of the taking and increases to sixteen percent annually thereafter. See G. L. c. 59, § 57; G. L. c. 60, § 62.

the foreclosure of all rights of redemption." G. L. c. 60, § 65.

Once a petition for foreclosure is filed, the taxpayer is notified of the obligation to appear and answer the petition. G. L. c. 60, §§ 65, 66. The taxpayer's failure to respond or redeem permits the assigned party to move to foreclose the taxpayer's right of redemption. G. L. c. 60, § 67. If the court renders a judgment of foreclosure, "strict foreclosure" results and the assigned party takes absolute title to the property free and clear from any and all encumbrances thereon.³ Williams, 485 Mass. at 452. See G. L. c. 60, §§ 64, 69.

Pursuant to G. L. c. 60, § 69A, however, the foreclosure judgment may be vacated if the taxpayer pays the entire redemption amount, plus interest, within one year. Beyond one year, the judgment may be vacated upon a showing that the taxpayer's due process rights were denied. See Williams, 485 Mass. at 453; Ithaca Fin., LLC v. Lopez, 95 Mass. App. Ct. 241, 243 (2019) ("Absent a showing of a due process violation, strict adherence to this one-year period is mandatory").

³ We cannot overstate the severity of the impact that a tax foreclosure judgment may have on the taxpayer. "See Tallage LLC vs. Meaney, Mass. Land Ct., No. 11 TL 143094 (June 26, 2015) (failure of taxpayers to pay municipal water and sewer bills amounting to \$492.51 resulted in foreclosure on property with fair market value of \$270,000)." Williams, 485 Mass. at 453.

Facts. The following facts were found by the judge in a comprehensive memorandum of decision or are undisputed in the record. On October 30, 2006, Plymouth Park Tax Services LLC, doing business as XSPAND (collectively, Plymouth Park), offered to purchase a portfolio of delinquent tax receivables that were owed to the city of Lawrence (city). Plymouth Park's offer outlined its plan to collect on delinquent taxes and how it intended to communicate with the city's taxpayers. On or about September 26, 2008, the city and Plymouth Park entered into a purchase and sale agreement whereby Plymouth Park became the city's assignee of the right to collect on tax delinquencies. One such delinquency pertained to property located at 116 Bunkerhill Street (property), which was owned by Felicia Hilario.

Hilario owed the city \$3,229.66 in taxes for the 2008 and 2009 fiscal years. On February 16, 2010, Plymouth Park recorded an instrument of taking against the property for unpaid taxes, interest, and incidental expenses for those fiscal years in the registry of deeds. Leger purchased the property from Hilario on July 31, 2012.⁴ During the transaction, an attorney for the mortgagee bank neglected to obtain a municipal lien certificate from the city or otherwise inquire as to the status of

⁴ Since she purchased the property, Leger has faithfully paid her real estate taxes.

outstanding taxes owed on the property. Leger was not aware of any tax liens on the property at the time of the purchase.

On May 24, 2013, the city recorded a second instrument of taking against the property for unpaid taxes during the 2012 fiscal year, which incorrectly listed Hilario as the owner of the property. On or around March 21, 2014, Plymouth Park assigned its right, title, and interest in the property to Ithaca for \$6,478.42.

On March 31, 2014, Ithaca sent a single letter, titled "Notice of Assignment of Real Estate Tax Lien," to the property address; the letter was addressed to both Hilario and Leger, who both lived at the property at that time.⁵ Ithaca then filed the present tax taking action on May 20, 2014. Because Ithaca did not name Leger as a defendant and incorrectly listed Hilario as the property's owner, it was given leave to amend its petition to list Leger as a defendant. The Land Court subsequently issued a special citation notifying Leger that Ithaca had filed a petition to foreclose her right of redemption to the property. The special citation explained that a "complaint . . . to foreclose all rights of redemption concerning" the property had been filed against Leger, set forth how to respond and the date by which to respond, and stated that a failure to appear would

⁵ The record indicates that the property was a multi-family building.

result in a default. Leger failed to respond, and Ithaca's motion for default was allowed on May 19, 2016. Final judgment foreclosing Leger's right of redemption entered on May 31, 2016.

On June 16, 2017, approximately two weeks after the one-year statutory redemption period had expired, Ithaca notified Leger by letter that it was "the owner of the property which you currently occupy" and directed her to begin making payments "for use and occupancy charges" to Ithaca. Leger thereafter filed a motion for relief from the judgment of foreclosure.

Following a two-day evidentiary hearing, the judge granted Leger's motion. The judge concluded that Ithaca violated Leger's right to due process by failing to abide by various provisions of G. L. c. 60, § 2C, as we outline infra. The judge determined that "[t]he denial of due process caused by Ithaca's and Plymouth Park's combined failures to comply with the conditions of assignment and the requirements of the statute was not cured by [Leger's] receipt of the special citation served on her by the Land Court upon the initiation of the tax foreclosure proceeding." This appeal followed.

On appeal, Ithaca claims, *inter alia*, that Leger was afforded due process because the Land Court provided her with

notice of Ithaca's petition to foreclose, to which she ultimately failed to respond.⁶ We agree.

Discussion. 1. Standard of review. "General Laws c. 60, § 69A, and related case law, govern petitions to vacate judgments of foreclosure." Worcester, 77 Mass. App. Ct. at 67. "[A] petition to vacate a prior decree foreclosing the right of redemption under a tax title is 'extraordinary in nature and ought to be granted only after careful consideration and in instances where . . . [it is] required to accomplish justice.'" Sharon v. Kafka, 18 Mass. App. Ct. 541, 542 (1984), quoting Lynch v. Boston, 313 Mass. 478, 480 (1943). "Allowance of a petition rests 'largely but not entirely in the discretion of the trial judge.' . . . Consequently we review the denial of the petition for abuse of discretion and error of law." Worcester, supra, quoting Lynch, supra.

2. Whether Leger was afforded due process by her receipt of the Land Court special citation. The due process clause of the Fourteenth Amendment to the United States Constitution provides that no State shall "deprive any person of life, liberty, or property, without due process of law." "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably

⁶ Ithaca raises additional claims in its appellate brief. In light of our conclusion, however, we need not address them.

calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). "Applying this constitutional standard to a government sale of private land for failure to pay taxes, the [United States Supreme] Court explained that '[n]otice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party" Andover v. State Fin. Servs., Inc., 432 Mass. 571, 574 (2000), quoting Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 800 (1983).

"[General Laws] c. 60, § 66, requires that notice of the petition to foreclose be sent to interested parties by certified mail. G. L. c. 60, § 66. G. L. c. 4, § 7, Forty-fourth. By requiring certified mail, as opposed to first class mail, our notice statute not only satisfies due process, but provides greater assurance to our property owners that notice will actually be received." Andover, 432 Mass. at 575. Leger does not dispute that she was given notice of the petition to foreclose her right of redemption by the Land Court by special citation. Indeed, her signature appears on the green certified mail receipt card indicating that she received the notice, a point she does not dispute on appeal.

The focus of the judge's decision was Ithaca's pursuit of an inequitable foreclosure that resulted in the deprivation of Leger's due process rights. Essentially, the judge determined that an entity Leger had never heard of took title to her property on the basis of Hilario's failure to pay the property taxes.⁷ The judge specifically found that Ithaca did not communicate with Leger from the time it acquired "the tax receivable on the Property" in 2014 until it mailed Leger a letter in June 2017 informing her that she no longer owned the property and was to begin making payments to Ithaca. Additionally, the judge ruled that Ithaca violated G. L. c. 60, § 2C, by failing to abide by the terms of its assignment from Plymouth Park, which had predicated its purchase of delinquent tax receivables from the city on communicating with taxpayers and assisting in their repayment efforts prior to commencing a foreclosure. See G. L. c. 60, § 2C (c) (1) (iii) (assigned tax receivables shall be sold "to the most responsible and responsive offeror" subject to consideration of "the offeror's plan for communicating with the taxpayers"); G. L. c. 60, § 2C (g) (3) (assigned tax receivables must be transferred "under the same terms and conditions and in the same manner as

⁷ Nevertheless, tax liens attach to the property and not the person. See Luchini v. Commissioner of Revenue, 436 Mass. 403, 406 (2002).

originally assigned and transferred"). Finally, the judge found that Ithaca violated an explicit statutory obligation to notify the city and Leger of the assignment from Plymouth Park within twelve days. See G. L. c. 60, § 2C (c) (9).

While we empathize with Leger's plight under the unfortunate circumstances of this case, binding precedent requires us to conclude that due process was satisfied. The failure to give notice to an interested party of a tax foreclosure proceeding in Land Court constitutes a due process violation. See, e.g., North Reading v. Welch, 46 Mass. App. Ct. 818, 819-820 (1999); Boston v. James, 26 Mass. App. Ct. 625, 630 (1988). We are not aware of any case that stands for the proposition that a foreclosing entity's violation of the tax lien statute's assignment and communication procedures, as the judge found here, amounts to a denial of due process. To the contrary, the Supreme Judicial Court has reasoned that sending the Land Court notice to the taxpayer by certified mail, return receipt requested, was "all due process requires," at least where, as here, the return receipt indicated that the notice was received. Andover, 432 Mass. at 575.

Leger received notice from the Land Court of Ithaca's petition to foreclose her right of redemption. She signed the card indicating her receipt thereof. She did not respond, and strict foreclosure entered against her. With the one-year

redemption period running, Ithaca had no legal obligation to notify Leger of the foreclosure judgment. See Williams, 485 Mass. at 469 (Appendix) ("If a taxpayer fails to file a timely response to the petition to foreclose and if the owner of the tax title moves the Land Court to enter a judgment of foreclosure of the right of redemption, there is no statutory requirement that the taxpayer be notified of the foreclosure judgment"). After one year, the command of G. L. c. 60, § 69A, which protects the public's "need for an efficient and final determination of any dispute regarding a public landtaking, so that title to the land taken can be settled," Sharon, 18 Mass. App. Ct. at 543, quoting Whitehouse v. Sherborn, 11 Mass. App. Ct. 668, 671 (1981), bars relief absent a due process violation. "The Legislature appears to have determined that the public interest in marketable titles for tax takings 'outweighs considerations of individual hardship' after one year."⁸ Sharon, supra, quoting Hardisty v. Kay, 268 Md. 202, 208 (1973).

⁸ The present case implicates rather unusual circumstances. For instance, the foreclosing entity here is a private party, not a municipality. As one Land Court decision explained, "[s]uch entities are responsible to their investors, not the citizens of a city or town, and their goals and incentives are not the same. Maximizing return on investment may not include accommodation to individual circumstance to the same extent a municipality, acting for itself, might otherwise deem warranted." Tallage LLC vs. Meaney, Mass. Land Ct., No. 11 TL 143094 (June 26, 2015). Actions taken by private entities are not afforded the traditional level of judicial discretion and deference that a public entity enjoys. See Navy Yard Four

In sum, because Leger was afforded constitutionally acceptable notice of Ithaca's foreclosure petition pursuant to G. L. c. 60, § 66, we "may not subject the legislative judgment to a judicial review of its equity." Andover, 432 Mass. at 576.

Conclusion. The order allowing the motion for relief from the judgment of foreclosure is vacated, and the case is remanded with direction to deny the motion.

So ordered.

Assocs., LLC v. Department of Env'tl. Protection, 88 Mass. App. Ct. 213, 223 (2015).

Moreover, as the judge concluded and as we have outlined in this opinion, Ithaca's violations of several provisions of G. L. c. 60, § 2C, resulted in an inequitable foreclosure. We note that established case law requires the provisions of c. 60 to be strictly construed in favor of protecting the taxpayer's right of redemption. See Williams, 485 Mass. at 457, citing Snow v. Marlborough, 301 Mass. 422, 426-427 (1938). We question whether, in light of the severe consequences a taxpayer faces in these proceedings, the Legislature fully considered the desirability of completely prohibiting relief after one year in a circumstance where a private entity repeatedly violated explicit statutory obligations.